

Shergill v. Immigration and Nationalization Service, No. 01-70778
McKEOWN, Circuit Judge, dissenting:

APR 8 2003

CATHY A. CATTERSON
U.S. COURT OF APPEALS

I respectfully dissent. This case rises and falls on the well established standard of review in immigration cases. Under the substantial evidence standard, the Board of Immigration Appeal's ("BIA") factual findings can only be reversed if "the evidence presented . . . was such that a reasonable factfinder would have to conclude [that the BIA erred]." INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992). Accord Garrovillas v. INS, 156 F.3d 1010, 1013 (9th Cir. 1998) (holding BIA's credibility findings reviewed under substantial evidence standard). In other words, the evidence must not only support a contrary conclusion, it must compel such a conclusion. Elias-Zacarias, 502 U.S. at 481 n.l.

The majority writes an eloquent brief for why the BIA could have come out differently and, in doing so, reweighs the evidence, parses language, and weaves a plausible story. The standard of review is not de novo and we are not asked to determine whether the IJ or the BIA could have reached a different conclusion. Indeed, they could have. The question is whether the evidence compelled a different result, that is whether substantial evidence is lacking to support the BIA's determination.

Here, the evidence does not compel us to reverse the BIA's adverse credibility finding. To the contrary, the BIA's finding is supported by substantial

evidence in the record. Most notably, there is a conflict in Shergill's testimony with respect to whether he supports the formation of the independent state of Khalistan. In his asylum application he states that he "demanded the peaceful creation of an independent Sikh State of Khalistan" whereas he claimed at his hearing that he "[did not] want Khalistan." The majority goes to unusual lengths to explain away this inconsistency, writing it off as "attributable to the applicant's language problems, [] typographical errors" or a legal assistant's failure to "appreciate the fine distinction" between believing that life would be better if an independent state of Khalistan were formed and supporting its formation. The record, however, contains no evidence of confusion due to a language problem, let alone due to a legal assistant's transcription error.

The BIA credibility determination is also supported by the fact that Shergill failed to mention key evidence during his hearing, namely that he was subjected to three bodily searches, although these searches were discussed in depth in his asylum application. In addition, Shergill's hearing testimony that he was arrested, detained, and beaten in December of 1991 and February of 1992 contrasts with his asylum application in which he states only that his brother was arrested and beaten during these months. These inconsistencies are neither minor nor collateral but rather "involve[] the heart of the asylum claim." See Ceballos-Castillo v. INS, 904 F.2d 519, 520 (9th Cir. 1990). Because these inconsistencies could "be

viewed as attempts by the applicant to enhance his claims of persecution,” we cannot conclude, as the majority does here, that these inconsistencies “have no bearing on credibility.” See Damaize-Job v. INS, 787 F.2d 1332, 1337 (9th Cir. 1986).

Although reasonable minds can differ over whether Shergill gave credible testimony, it is not enough to conclude, as the majority appears to do, that a positive credibility finding could be supported by the record. To reverse the BIA’s adverse credibility finding, we must conclude that no reasonable person could have found Shergill not to be credible. We cannot do so here.

I would sustain the BIA’s determination but remand to allow him to file for relief under the convention against torture. Kamalthas v. INS, 251 F.3d 1279 (9th Cir. 2001) (holding that “inability to state a cognizable asylum claim does not necessarily conclude relief under the convention against torture”).